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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 102

EDDIE BRATBURD, AND RUTH E. BRATBURD,
Petitioners,

vs.

STATE OF MARYLAND,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND AND BRIEF IN SUPPORT THEREOF

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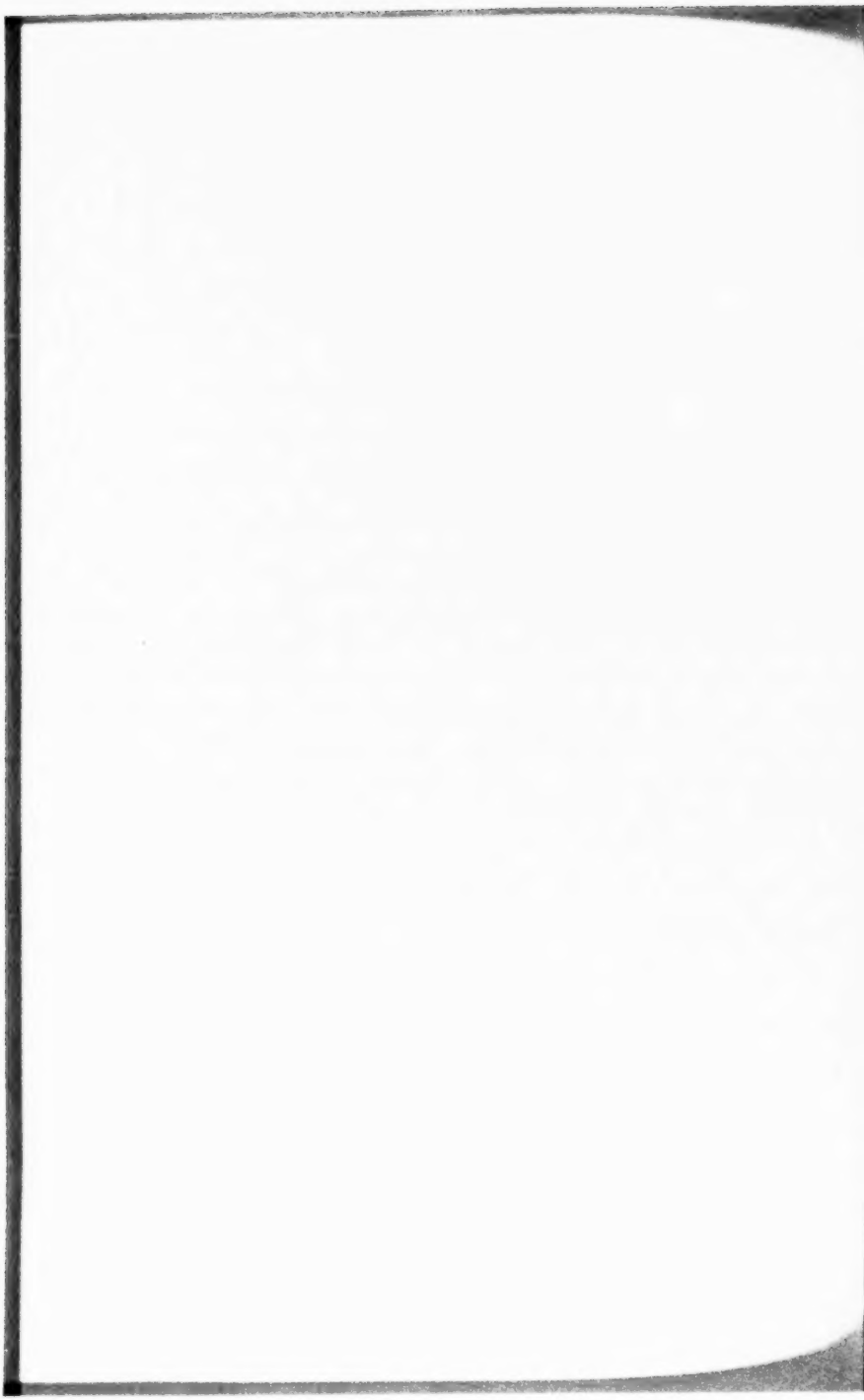

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OCTOBER TERM, 1952

No. 102

EDDIE BRATBURD, AND RUTH E. BRATBURD,
Petitioners,

vs.

STATE OF MARYLAND,

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND AND BRIEF IN SUPPORT THEREOF

To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

Summary Statement of the Matter Involved

Heretofore in June, 1951, one Kenneth W. Watkins, a Corporal attached to the Montgomery County, Maryland, Police Department, made application for a Search Warrant to enable him to search the residence of your petitioners.

Corporal Watkins stated the petitioners here were committing a misdemeanor; being unlawfully in possession of

gambling paraphernalia, in violation of Section 50-3 of the Montgomery County, Maryland, County Code, 1950 Edition.

Corporal Watkins, in his affidavit supporting his application for search warrant, spells out succinctly and eloquently the activities and proceedings resorted to in order that evidence of a criminal offense might be obtained against your petitioners.

At Appendix p. 6, the Corporal says:

> Your affiant states the following grounds as basis for his belief; that your affiant has checked the Land Records at the Office of the Clerk of the Circuit Court in Rockville, Maryland, and found that in Liber 1005, Folio 297, Lot numbered 6, known as "Grafton Mangums" is listed to Eddie Bratburd, 8869 Piney Branch Road, Silver Spring, Maryland; that your affiant further states that he checked the Telephone Company's Street Address Directory and found nothing listed to the house located at 8869 Piney Branch Road, Silver Spring, Maryland; that your affiant then checked the Telephone Company's current name directory and found nothing listed to Eddie Bratburd; that your affiant was reliably informed that there was a telephone line servicing the house at 8869 Piney Branch Road, Silver Spring, Maryland; that the telephone number was Shepherd 0925; that the number Shepherd 0925 was listed to Eddie Bratburd, 8869 Piney Branch Road, Silver Spring, Maryland; that the number Shepherd 0925 was a "NON-published" number;
>
> That your affiant was further reliably informed that the telephone line servicing the number Shepherd 0925 could be tapped at the telephone company's terminal box located at 126 Ames Road, Silver Spring, Maryland;
>
> That on June 17th, 1951, at about the hour of one forty A. M., your affiant, in company with Officer Reuben D. Hett, went to 126 Ames Road, Silver Spring, Maryland (see Off. Reuben Hett's affidavit, Appendix 16-18); that Officer Reuben D. Hett, having previously had four and one-half years experience with the Telephone Company during which time he worked on the

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outside on the overhead lines and became very familiar with the stringing of wire, terminal boxes, and installations of telephones generally; that your affiant and Officer Hett had with them the necessary wire and equip- (Appendix 7) ment and fastened the wire to a line that they verily believed was the line servicing the number Shepherd 0925;

That on June 19, 1951, at about the hour of one forty A. M. your affiant in company with Sgt. William M. Whalen and Officer Reuben D. Hett went to the Telephone Company's pole number 90, which is located directly in front of the house at 8869 Piney Branch Road, Silver Spring, Maryland; that your affiant then asked Officer Hett to climb the aforementioned pole number 90, that your affiant then asked Officer Hett to tap in on the line after it left the said pole number 90 and went directly to the house at 8869 Piney Branch Road, Silver Spring, Maryland;

That your affiant then went to 126 Ames Road, Silver Spring, Maryland, where he had previously fastened a wire to a line that he verily believed was the line servicing the telephone number Shepherd 0925; that there with the aid of a listening and talking device your affiant carried on a conversation with a voice that he recognized as being that of Officer Hett who was on the pole directly in front of the house at 8869 Piney Branch Road, Silver Spring, Maryland; thereby confirming that the line on which your affiant was listening was the same line leading directly to the house at 8869 Piney Branch Road, Silver Spring, Maryland;

That on June 19th, 1951, at about the hour of twelve forty-five P.M., your affiant went to 126 Ames Road, Silver Spring, Maryland, and there with the aid of a listening device commonly known as a "head set" your affiant listened on the line verily believed went to the house at 8869 Piney Branch Road, Silver Spring, Maryland; * * *

(The affidavit then narrates a lengthy list of conversations tending to indicate the speakers were engaged in gambling activity.)

Proceeding, the affidavit details a further tap on the same line on June 20, 1951, on which occasion similar results were obtained.

At Appendix p. 11, Corporal Watkins continues thus:

> Your affiant having previously been reliably informed that the telephone line servicing Shepherd 0925 could be tapped at the telephone company's terminal box located at 447 South Hampton Drive, Silver Spring, Maryland, went on June 20th, 1951, at about 11:40 P.M., for security reasons, to 447 South Hampton Drive, Silver Spring, Maryland, in company with Officer Reuben D. Hett and Sgt. William W. Whalen and there found a terminal box and having taken the necessary wire and equipment, Officer Hett tapped in on a line that he verily believed was the line servicing Shepherd 0925. That your affiant then went to 126 Ames Road, Silver Spring, Maryland, where he had previously listened to numbers bets being taken over the wire on which he had previously listened that he verily believed was the line servicing Shepherd 0925. That there, with the aid of a listening device, your affiant carried on a conversation with a voice that he recognized as being that of Officer Reuben D. Hett who was at the telephone company's terminal box located at 447 South Hampton Drive, Silver Spring, Maryland, thereby confirming that the line on which Officer Hett had tapped at 447 South Hampton Drive, Silver Spring, Maryland, was the same line that your affiant had previously heard numbers bets being taken.

Corporal Watkins' affidavit continues with a recital of further detailed intercepted conversations on June 21 and June 22, 1951.

The search warrant issued June 27, 1951—Appendix, p. 30.

On June 28, 1951, return to the warrant was made—Appendix, 30-32—reciting that your petitioners here and ap-

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pellants below had been arrested and that the following property was seized:

1 Burroughs adding machine (manual operated); 1 (No Name) Adding Machine (electrically operated), Serial # 120117-92 AE; 2 Telephones; 918 Slips containing numbers bets; 53 small paper pads (plain); 10 sheets of paper containing numbers; 16 sheets of plain paper; 15 paper pads (ruled-yellow); 30 paper pads (ruled-pink); 11 William Armstrong scratch sheets; 34 small manila paper envelopes (used); 1 box of "No. 1" manila envelopes ruled and marked for day of week (approx. 400 in box); 34 manila envelopes (new); 1 box "Yosemite" coin envelopes (approx. 450 in the box); 49 paper wrappers (coin) for pennies; 15 paper wrappers (coin) for quarters; 46 paper wrappers (coin) for nickels; 100 paper wrappers (coin) for halves; 648 slips containing gambling information; cash found in the house in the room used by Eddie Bratburd —$61.85; cash taken from the person of Eddie Bratburd in the amount of $78.59.

Thereafter a formal charge of violation of Section 50-3 of the Montgomery County Code was lodged against your petitioners here and appellants below.

Counsel has listed those charges and the attending legal proceedings, immediately hereinafter.

The formal accusatians of criminal offenses which gave rise to litigation petitioners pray this Court to review are set forth in petitioners' Appendix, pp. 4 and 5, and read as follows:

STATE WARRANT

(Filed August 23, 1951)

State of Maryland, Montgomery County, to wit:

To Charles M. Orme, Chief of Police of said County, Greeting:

WHEREAS, Complaint hath been made upon the information and oath of Dept. Cpl. K. W. Watkins, M.C.P.,

who charges Ruth E. Bratburd, late of the County and State on the 27th day of June 1951 at the County and State aforesaid did unlawfully violate Section 50-3 of the Montgomery County Code, 1950 Edition, to wit: did have in her possession in the house at 8869 Piney Branch Road, Silver Spring, Maryland, gambling paraphernalia, including lists, slips and records of numbers drawn in a lottery, against the peace, government and dignity of the State.

You are hereby commanded immediately to apprehend the said Ruth E. Bratburd and bring her before J. Fendall Coughlan, Trial Magistrate, at Silver Spring, Montgomery County, to be dealt with according to law. Hereof fail not, and have you there this Warrant.

SAMUEL R. ROBERTSON,
Justice of the Peace for Montgomery County, Maryland.

Issued June 27, 1951.

STATE WARRANT

(Filed August 23, 1951)

State of Maryland, Montgomery County, to wit:

To Charles M. Orme, Chief of Police of said County, Greeting:

WHEREAS, Complaint hath been made upon the information and oath of Dept. Cpl. K. W. Watkins, M.C.P., who charges Eddie Bratburd, late of the County and State, on the 27th day of June 1951 at the County and State aforesaid, did unlawfully violate Section 50-3 of the Montgomery County Code, 1950 Edition, to wit: did have in his possession in the house at 8869 Piney Branch Road, Silver Spring, Maryland, gambling paraphernalia, including lists, slips and records of numbers drawn in a lottery, against the peace, government and dignity of the State.

You are hereby commanded immediately to apprehend the said Eddie Bratburd and bring him before J.

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Fendall Coughlan, Trial Magistrate at Silver Spring, Montgomery County, to be dealt with according to law. Hereof fail not, and have you there this Warrant.

SAMUEL R. ROBERTSON,
Justice of the Peace For Montgomery County, Maryland.

Issued June 27, 1951.

Pursuant to the command of the said Warrants, the persons named therein were apprehended and brought to trial. Prior to trial, counsel below, filed the following pleading:

MOTION TO DISMISS

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY

Criminal Appeals No. 72

Nov. Term, 1951

STATE OF MARYLAND

vs.

EDDIE BRATBURD

The defendant by his attorney moves the Court to dismiss the above entitled action, and as reasons therefor shows unto the Court:

1. That the search and seizure was in violation of the rights guaranteed to the defendant by the 4th, 5th and 14th amendments to the Federal Constitution and Articles 22 and 26 of the Bill of Rights of Maryland; and prohibited by Article 35, section 5 of Flack's Annotated Code of Maryland, known as the "Bouse Act", and Section 605 of the Federal Communications Act of 1934.

2. That the search warrant was based on evidence and matters illegally obtained and the property listed was not subject to seizure under the criminal laws of the State of Maryland.

3. That the prosecution is not based upon a valid act of the Montgomery Code of 1950, for the following reasons:

(a) Article 50-3, of the Montgomery County Code of 1950, upon which this seach warrant was issued is unconstitutional, is inconsistent with, and contrary to the laws of the General Assembly and the Constitution of Maryland.

(b) Article 50 and all the subsections of said Article became null and void when Montgomery County adopted a Charter form of Government.

4. That no law of this State was violated in the presence or view of the officers making the search and seizure.

5. That the property taken by the officers is not admissible in evidence against the defendant at the trial of this cause.

6. That the search warrant issued in this case is invalid because it fails to identify this defendant as one of the persons to be searched and seized.

7. That the search warrant issued in this case is void because the information upon which it was issued is not sufficient in law to constitute probable cause.

8. That if Article 50-5 of the Montgomery Code of 1950, is a valid enactment and not unconstitutional, then the search warrant issued in this case is void ab initio because it was issued by a Judge of the Circuit Court whereas Article 50-3 of the Montgomery County Code of 1950, provides that only a Justice of the Peace or the Grand Jury may issue such a search warrant, and no provision is made for its issuance by a Judge of the Circuit Court.

9. For other reasons to be assigned at the hearing of this motion.

PAUL D. TAGGART,
Attorney for Defendant.

(Identical Motion to Dismiss filed in Case No. 70—State of Maryland v. Ruth Bratburd). See Appendix pp. 2, 3.

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These Motions were denied, at appendix 35, as follows:

TESTIMONY

(No. 72 Criminal Appeals)

(At the Bench).

(Judge Prescott): Put in the record that Mr. Taggart wants me to again pass on the motion to dismiss that has already been passed on by Judge Woodward, and the Court told him it is absolutely a childish motion. When one Judge passes on a motion and it is in the record, it is not necessary to have it in there four or five different times.

The cause went to trial on the merits and each defendant was found guilty. The judgments appear at appendix p. 1, as follows:

JUDGMENT IN CASE NUMBER 70

December 4, 1951—Judgment that the Traverser, Eddie Bratburd, be confined in the Montgomery County Jail for a period of Six months (6), and immediately thereafter and in addition thereto, pay a fine of Five Hundred and no/00 dollars ($500.00) and costs in default of payment of said fine and costs, that the Traverser Eddie Bratburd, be confined in the Montgomery County Jail until the fine and costs are paid or until released by due process of law.

JUDGMENT IN CASE NUMBER 72

December 4, 1951—Judgment that the Traverser, Ruth E. Bratburd, be confined in the Montgomery County Jail for a period of Six (6) months, and immediately thereafter and in addition thereto pay a fine of Five Hundred and no/00 dollars ($500.00) and costs, and in default of payment of said fine and costs that the Traverser, Ruth E. Bratburd, be confined in the Mont-

gomery Jail until the fine and costs are paid or until released by due process of law.

Thereafter in the Court of Appeals of Maryland, in Case No. 160, October Term, 1951 petitioners here and appellants there filed proper appeal on January 23, 1952; and on May 8, 1952, that appellate Court Affirmed the Judgment of the Trial Court.

In the Court of Appeals of Maryland, petitioners here and appellants there, presented Six Questions For Decision.

These Questions For Decision, were as follows:

I. Was reversible error committed by the lower court in refusing to grant appellants motions to dismiss?

II. In view of the constitutional prohibition in Article 11A, Maryland Constitution and Article 25A of the Annotated Code of Maryland, 1939 ed., known as the Express Powers Act, was Chapter 50 of the Montgomery County Code, 1950 ed. (App. 32) a valid and constitutional statute enforceable after Montgomery County adopted a Charter form of government in 1948?

III. Assuming the answer to question No. 2 to be in the affirmative, is a circuit court judge authorized by Chapter 50 of the Montgomery County Code 1950 ed., to issue a search warrant under its provisions?

IV. Is evidence solely through "wire-tapping" which is done prior to the application and issuance of a search warrant sufficient to constitute probable cause for issuance of a search warrant?

V. Did admission of the evidence secured by "wire-tapping" over the objections of counsel for appellants, violate the rights secured to these appellants by Article 35 section 5, known as the Bouse Act, and Articles 22 and 26 of the Bill of Rights, and the 4th, 5th and 14th amendments to the Federal Constitution?

VI. Did the admission of evidence obtained by "wire-tapping" over objections of counsel for appellants make the appellants witnesses against themselves

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in violation of the prohibition of the Bouse Act, Article 35, section 5?

The Court of Appeals of Maryland, in a written opinion not yet printed, *held,* as follows:

THE COURT OF APPEALS OF MARYLAND

No. 160

October Term, 1951

EDDIE BRATBURD

vs.

STATE OF MARYLAND

RUTH E. BRATBURD

vs.

STATE OF MARYLAND

Judge Delaplaine delivered the opinion of the Court.

These appeals were taken by Eddie Bratburd, and Ruth E. Bratburd, his wife, residents of Silver Spring, from convictions for the possession of gambling paraphernalia in violation of the Montgomery County gambling law. Laws 1924, ch. 483, Montgomery County Code, 1950 Ed., sec. 50-3.

On June 27, 1951, Chief Judge Woodward of the Circuit Court for Montgomery County issued a search warrant commanding Corporal Watkins of the Montgomery County Police Department to search Bratburd's home at 8869 Piney Branch Road for gambling paraphernalia as prohibited by Section 50-3 of the Montgomery County Code. The warrant was issued upon the officer's affidavit that, by means of wire tapping, he and other officers had overheard numerous

conversations in which Bratburd had engaged in carrying on gambling operations. On the same day the officers raided the house, arrested Bratburd and his wife, and seized two adding machines, two telephones, 918 slips containing numbers bets, 648 slips containing gambling information, and other gambling paraphernalia.

Each appellant filed a motion to dismiss the action, but the motions were overruled. Appellants filed actions in the United States District Court for the District of Maryland for an injunction to prohibit the police officers from divulging the contents of the intercepted telephone conversations which they proposed to use as evidence in prosecutions. Judge Chestnut dismissed the complaints, holding that the Federal Court was without jurisdiction to issue an injunction against testimony proposed to be given by witnesses in a state criminal prosecution. Bratburd *v.* Dawson, 101 F. Supp. 414.

The instant cases were tried separately by jury with Associate Judge Prescott presiding. In each case the jury found a verdict of guilty, and the Court sentenced each defendant to be confined in the Montgomery County Jail for the period of six months and to pay a fine of $500.

First. Appellants contended that Section 50-7 of the Montgomery County Code, which prescribes that the penalty for violation of the local gambling law shall be a fine of not more than $1,000 or imprisonment in jail for not more than one year, or both such fine and imprisonment in the discretion of the Court, was repealed by the Montgomery County Charter, and that the sentences imposed upon them exceeded the maximum limits prescribed by law.

In pursuance of Article XIA of the Constitution of Maryland, known as the Home Rule Amendment, which was proposed by the Maryland Legislature in 1914, Laws 1914, ch. 416, and ratified by the voters of the State in 1915, the Legislature enacted in 1918 the Express Powers Act, which granted to any county which

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should thereafter form a charter under the provisions of Article XI the power: (1) to enact local laws for such county, including the power to repeal or amend local laws enacted by the Legislature upon the matters covered by the express powers granted in the Act; and (2) to provide for the enforcement of all ordinances, resolutions, by-laws and regulations adopted under the authority of the Act by fines, penalties and imprisonment, enforceable according to law as may be prescribed, with the proviso that "no such fine or penalty shall exceed $100.00 for any offense or imprisonment for more than six months." Laws 1918, ch. 456, Code 1939, art. 25A, sec. 3.

The question of creating a Charter Board for Montgomery County was first presented to the electorate of the county at the general election in November, 1942. The Board was created and it submitted a Charter to the County Commissioners of Montgomery County in May, 1943. That Charter failed of adoption at the general election in November, 1944. At the general election in November, 1946, the second Charter Board was created and it submitted a Charter to the County Commissioners in May, 1947. This Charter was adopted at the general election in November, 1948, and it became law on the thirtieth day following its adoption.

Montgomery County is the first county in the State to adopt a Charter under the provisions of the Home Rule Amendment. The Charter established a county government with local legislative power exercised by the County Council in place of the previous system of government by County Commissioners exercising no general legislative power. We have decided several problems arising out of the adoption of the Charter. Schneider *v.* Lansdale, 191 Md. 317, 61 A. 2d 671; County Com'rs for Montgomery County *v.* Supervisors of Elections of Montgomery County, 192 Md. 196, 63 A. 2d 735; Ames *v.* Board of Supervisors of Elections of Montgomery County, Md., 74 A. 2d 29.

Under the Charter the County Council has the power to enact public local laws for the county and repeal or amend local laws theretofore enacted by the Legislature upon the matters covered by the Express Powers Act. Charter, art. 2, sec. 4. The local gambling law has not been repealed by the County Council. But appellants argued that the Express Powers Act defined the scope of the legislative power of the County Council; and although the County Council may enact a local gambling law different from the public general law, no local law can validly prescribe maximum penalties greater than those prescribed by the Express Powers Act.

The Charter provides that the public local laws of the county in force at the time the Charter becomes law are repealed to the extent that they are clearly inconsistent with provisions of the Charter, but no further; and all other public local laws shall continue in full force and effect until repealed or amended. Charter, art. 9, sec. 6. However, we cannot agree with appellants that the local gambling law is inconsistent with the provisions of the Charter. The proviso in the Express Powers Act that no penalty shall exceed a fine of $100 or imprisonment for more than six months refers to "ordinances, resolutions, by-laws and regulations" adopted by the County Council and enforceable as may be prescribed by it. The proviso is a limitation upon the power of the County Council, not a restriction upon the Legislature. We hold that Section 50-7 is still in force.

Second. Appellants urged that the search warrant, which authorized a search for gambling paraphernalia, "As prohibited by Section 50-3 of the Montgomery County Code," was invalid because it was issued by the Chief Judge of the Circuit Court, whereas Section 50-5 authorizes justices of the peace and the Clerk of the Circuit Court, but not Judges of the Circuit Court, to issue warrants for search of gambling paraphernalia in Montgomery County.

The answer to this complaint is that the Chief Judge of the Circuit Court has authority to issue search war-

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rants under the Maryland search warrant statute. This statute, enacted in 1939, fifteen years after the enactment of the local law, authorizes any Judge of the Supreme Bench of Baltimore City, or any Judge of any of the Circuit Courts in the Counties of this State, or any Justice of the Peace in this State, to issue a search warrant whenever it is made to appear, by a writing signed and sworn to by the applicant, that there is probable cause to believe that any misdemeanor or felony is being committed by any individual or in any place within the territorial jurisdiction of such Judge or Justice of the Peace, or that any property subject to seizure under the criminal laws of the State is located on the person of any such individual or in any such place. Laws 1939, ch. 749, Code 1939, art. 27, sec. 306, as amended by Laws 1950, ch. 81.

Therefore, although the warrant under attack was issued by the Chief Judge of the Circuit Court to authorize the search for gambling paraphernalia "as prohibited by Section 50-3 of the Montgomery Code," and although Section 50-5 of that Code authorizes only Justices of the Peace and the Clerk of the Circuit Court to issue search warrants, yet the Chief Judge had authority to issue the warrant under the Maryland search warrant statute. It is not essential to the validity of a search warrant that it shall mention the particular statute by authority of which it is issued.

Third. Appellants contended that the facts alleged in the warrant were obtained by means of wire tapping; that the interception of the telephone communications was unlawful; that the gambling paraphernalia seized under the warrant were unlawfully obtained; and that the paraphernalia were inadmissible in evidence under the Bouse Act, which declares that no evidence in the trial of misdemeanors shall be deemed admissible where the same shall have been procured by, through, or in consequence of any illegal search or seizure. Code Supp. 1947, art. 35, sec. 5, as amended by Laws 1951, chs. 704, 710.

This contention also must be rejected. In 1928 the United States Supreme Court in its landmark opinion

on wire tapping, Olmstead *v.* United States, 277 U.S. 438, 48 S. Ct. 564, 568, 569, 72 L. Ed. 944, 66 A. L. R. 376, decided that the guarantee in the Fourth Amendment against unreasonable search and seizure, while extending to sealed letters in the mail, does not extend to telephone and telegraph messages, and therefore the use of evidence of private conversations intercepted by means of wire tapping does not infringe any constitutional right. Chief Justice Taft clearly stated in the Court's opinion: "The Fourth Amendment may have proper application to a sealed letter in the mail because of the constitutional provision for the Post-office Department and the relations between the Government and those who pay to secure protection of their sealed letters. * * * It is plainly within the words of the Amendment to say that the unlawful rifling by a government agent of a sealed letter is a search and seizure of the sender's papers or effects. * * * The United States takes no such care of telegraph or telephone messages as of mailed sealed letters. The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants.* * * The language of the Amendment cannot be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office any more than are the highways along which they are stretched. * * * Congress may of course protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence. But the courts may not adopt such a policy by attributing an enlarged and unusual meaning to the Fourth Amendment."

The Chief Justice pointed out that the courts have no discretion to exclude evidence because secured unethically, in the absence of constitutional or statutory

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prohibition. "Our general experience," he said, "shows that much evidence has always been receivable although not obtained by conformity to the highest ethics. The history of criminal trials shows numerous cases or prosecutions of oathbound conspiracies for murder, robbery, and other crimes, where officers of the law have disguised themselves and joined the organizations, taken the oaths and given themselves every appearance of active members engaged in the promotion of crime, for the purpose of securing evidence. Evidence secured by such means has always been received."

Appellants insisted that the admission of the gambling paraphernalia as a result of wire tapping was an infringement of Article 22 of the Maryland Declaration of Rights, which declares: "That no man ought to be compelled to give evidence against himself in a criminal case." They relied on the recent decision in Rochin *v.* People of California, 72 S. Ct. 205, 96 L. Ed. 154, wherein a doctor was directed to force an emetic solution by means of a tube into the stomach of the defendant, who was accused of possessing morphine, thereby producting vomiting, and in the vomited matter were two capsules which proved to contain morphine. In that case the Court held that the proceeding by the officers to obtain evidence violated the Due Process Clause of the Fourteenth Amendment. That case is quite different from wire tapping. For instance, in Foley *v.* United States, 5 Cir., 64 F. 2d 1, 4, Judge Sibley observed that the eavesdropping of Federal officers by tapping telephone wires is no worse than other eavesdropping. We reaffirm that the admission of evidence obtained as the result of the interception of telephone conversations by wire tapping is not a violation of Article 22 of the Maryland Declaration of Rights. Rowan *v.* State, 175 Md. 547, 559, 3 A. 2d 753.

Appellants placed reliance upon the Federal Communications Act of 1934. That Act provides that no person not authorized by the sender shall intercept

any communication and divulge its contents to any person; and no person not entitled thereto shall receive any interstate or foreign communication by wire or radio. 47 U.S.C.A. sec. 605.

It was held by the United States Supreme Court in Nardone *v.* United States, 302 U.S. 379, 58 S. Ct. 275, 82 L. Ed. 314, that the Federal Communications Act prohibits any person from testifying in a Federal criminal trial as to an interstate message overheard by means of wire tapping. But the Act expressly declares that its provisions shall apply to interstate and foreign communications by wire or radio. 47 U.S.C.A. secs. 151, 152. The Act does not render inadmissible in a trial in a State Court any evidence secured as a result of wire tapping of an intrastate telephone communication. Hitzelberger *v.* State, 174 Md. 152, 168, 197 A. 605; Rowan *v.* State, 175 Md. 547, 560, 3 A. 2d 753; Leon *v.* State, 180 Md. 279, 284, 23 A. 2d 706, certiorari denied; Neal *v.* State of Maryland, 316 U. S. 680, 62 S. Ct. 1107, 86 L. Ed. 1753; People *v.* Kelley, Cal., 122 P. 2d 655, 659, aff'd 22 Calif. 2d 169, 137 P. 2d 1; Valli *v.* United States, 1 Cir., 94 F. 2d 687, 691.

As appellants failed to show that the search warrant issued in this case was invalid, the evidence seized under it was properly admitted by the trial Court. The judgments of conviction will therefore be affirmed.

Judgments affirmed, with costs.

Filed: May 8, 1952.

Below, counsel for petitioners here and appellants below assigned as fatal and prejudicial error the following assignments which have to do with construction of the applicable Maryland Constitutional and Statutory provisions; a detailed discussion of which is set forth in the brief supporting this petition.

Jurisdictional Statement

The jurisdiction of this Court is invoked under 28 U.S.C., 1254.

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Questions Presented

I

Was the use of the evidence obtained by wire tapping, over objections of the petitioners, a violation of their Constitutional right to a fair trial under due process of law?

II

Was the statute under which prosecution of petitioners was laid an unconstitutional provision of law, null and void under the terms and provisions of the Maryland Constitution and Statutes; resulting in a criminal prosecution devoid of jurisdiction and in deprivation of a fair trial under due process of law?

III

Was the search warrant a legal nullity in view of having been issued by an officer not authorized to issue such warrant, wherefore petitioners were deprived of a fair trial under due process of law?

Reasons Relied on for Allowance of Writ

The utilization of the evidence obtained by wire tapping robbed this criminal prosecution of any semblance to a fair trial under due process of law.

Below petitioners relied upon Amendments 4, 5 and 14 of the Constitution of the United States.

Counsel is not unmindful of this Court's pronouncement in *Wolf* v. *Colorado*, 338 U.S. 25, 93 L. Ed. 1782, 1785:

> The notion that the "due process of law" guaranteed by the Fourteenth Amendment is short hand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by this Court again and again, after impressive consideration.

We seek here to obtain a review of the instant cause because we feel that this following part of *Wolf* v. *Colorado, supra,* appearing at 93 L. Ed. 1785, embraces the instant litigation:

> The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment is basic to a free society. It is therefore implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process Clause.

There are present here weighty and legal restrictions upon the use of the evidence in question, which were absent in *Wolf* v. *Colorado, supra.*

These are:

1. CONSTITUTION OF MARYLAND

Adopted by the Convention

Which Assembled At the City of Annapolis On The Eight Day Of May, Eighteen Hundred and Sixty-Seven, And Adjourned On The Seventeenth Day of August, Eighteen Hundred And Sixty-Seven, And Ratified By The People On The Eighteenth Day Of September, Eighteen Hundred And Sixty-Seven, With Amendments.

DECLARATION OF RIGHTS

We, the people of the State of Maryland, grateful to Almighty God for our civil and religious liberty, and taking into our serious consideration the best means of establishing a good Constitution in this State for the sure foundation and more permanent security thereof, declare:

Article 1. That all Government of right originates from the People, is founded in compact only, and instituted solely for the good of the whole; and they have, at all times, the inalienable right to alter, reform or abolish their form of Government in such manner as they may deem expedient.

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> Article 2. *The Constitution of the United States, and the Laws made or which shall be made in pursuance thereof,* and all Treaties made, or which shall be made, *under the authority of the United States, are and shall be the Supreme Law of the State; and the Judges of this State, and all the People of this State, are, and shall be bound thereby,* anything in the Constitution of law of this State to the contrary notwithstanding.

Petitioners maintain that the People of the State of Maryland had plenary right and authority to impose this limitation upon the Government they chose to be theirs.

This Court, in *Martin* v. *Hunter's Lessee,* 1 Wheat, 4. L. Ed. 97, 102, said:

> • • • the powers of the states depend upon their own constitutions; and the people of every state had the right to modify and restrain them, according to their own views of policy or principle.

Because we are dealing with a State Constitution, petitioners cite State cases in their brief as follows:

Ebert v. *Dunseith,* 74 N.D. 1, 24 N.W. 2d, 907, 168 A.L.R. 621, 624 (1946);

Ellingham v. *Dye,* 178 Ind., 336, 99 N.E. 1, 4 (1912);

McMasters v. *West Chester Normal School,* 13 Pa. Co. Ct. 481, 487, (1893); which all hold to the cardinal principle that the people acting in their sovereign capacity have the right to limit the structure and mechanism of their various State government.

Petitioners maintain that by virtue of Article 2, Declaration of Rights, Maryland Constitution, *supra,* 47 U.S.C., sec. 605, as follows:

> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance,

purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination. * * *; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect or meaning of the same or any part thereof knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; * * *., applies to the instant cause.

This Court held in *Weiss* v. *United States*, 308 U.S. 327, 84 L. Ed. 298, 303, that the above statute applied to intrastate messages.

Further, it would appear that under Article VI, of the Constitution of the United States, the Supreme Clause demands that the State of Maryland abide by the provisions of 47 U. S. C., sec. 605. See *Testa* v. *Katt*, 330 U.S. 386, 91 L. Ed. 967.

In addition, Maryland Code, 1939 Ed., Article 35, Sec. 5, prohibits the use of the evidence under consideration. It reads as follows:

> 5. No evidence in the trial of a misdemeanor shall be deemed admissible where the same shall have been procured by, through, or in consequence of any illegal

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> search or seizure or of any search and seizure prohibited by the Declaration of Rights of this State; nor shall any evidence in such cases be admissible if procured by, through or in consequence of a search and seizure, the effect of the admission of which would be to compel one to give evidence against himself in a criminal case.

Petitioners argue that this Code provision expressly effectuates 47 U.S.C. Sec. 605, and binds the State Courts of Maryland to exclude the evidence under consideration here.

Petitioners therefore contend that this phase of the litigation below has,

1. Decided an important question of federal law, i.e., the force and effect a State Court is required to give 47 U. S. C., see 605; and

2. Decided that federal question in a way untenable and in conflict with the weight of authority, i.e., 47 U.S.C., sec. 605, is meaningless in a State Court; and

3. Decided an important question of federal law which has not been, but should be, settled by this Court, and in so doing, the Court below has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the Trial Court, as to call for an exercise of this Court's power of supervision, i.e., declared the protection of Amendment XIV, of the Federal Constitution to be void in the instant cause.

Counsel for petitioners realize that all parties who seek the review of this Court have cases of urgent importance—as such parties view the matter; but here we feel that the rights and immunities of all citizens in all states who use and subscribe to telephonic service are at stake; that the litigation concerns not petitioners alone, in their personal capacities, but the rights of millions of telephone users.

For, if first the state police can successfully violate 47 U.S.C., sec. 605, cannot the private investigator there-

after? May not any and all who are sufficiently curious, vigorous and resourceful make the privacy of the citizen using the telephone a mere expression—violating it at will and for whatever purposes which to the wire-tapper seem proper?

The statute under which the prosecution proceeded was unconstitutional and the search warrant was invalid under Maryland law.

The question presented by petitioners is whether reversible error was committed by the lower court in overruling the motions to dismiss (App. 4). The errors committed by the lower court are set forth in said motions. The first point involves the validity of Chapter 50 of the Montgomery County Code 1950 (ed.), after the adoption of a Charter form of County government in 1948. Under the provisions of Article 11A of the Maryland Constitution, any county in Maryland can adopt a charter, but only by complying with the constitutional provisions of said Article. Once the County has by referendum of the local electorate adopted a charter, it is bound by the explicit provisions of Article 25A of the Annotated Code of Maryland, Flack's 1939 (ed). Article 25A sets forth the matters and things that a County under Charter can do and very expressly sets forth the limitations that a county must observe under a Charter form of home rule. The express provision of Article 25A herein concerned is Section 3 (App. 35); which provides very emphatically that no criminal penalty can exist which exceeds a $100 fine and six (6) months imprisonment. Yet in the fact of this constitutional prohibition there are in Chapter 50 of the Montgomery County Code, 1950 (ed.), 3 separate penalty clauses (App. 32) all of which exceed the limitation set forth in the Express Powers Act, Article 25A. This question was put before the lower court twice and both times the motions to dismiss were overruled, see *Foreman* v. *State*, 182 Md. 415. The denial of these

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motions is difficult to reconcile with the provisions of the Constitutional amendment of Article 11A and Section 3 of the Express Powers Act. If the lower court is correct, then Article 11A and the Express Powers Act are without meaning. The purpose of the legislature in creating a home-rule for the various political subdivisions of the state is completely stultified and rendered nugatory. It is perfectly obvious that when the state legislature delegated a good portion of its law-making functions to the counties, it became necessary to have an amendment to our state constitution, and then a statute by the legislature to put into effect the rights granted by the said amendment. The purpose of the Express Powers Act, Article 25A, was to put into factual operation the general grant of powers. The history of these two provisions shows that the legislative intent was, by necessity, to limit the scope of home-rule that each county could indulge in and to strictly limit the range and scope of those delegated powers. What does it mean when the law says no penalty to exceed $100.00 fine and six (6) months imprisonment? It means that if Montgomery County, under Charter home-rule, wants a separate gambling law quite different from the state general law on gambling, then that local gambling law cannot differ from nor exceed the limitation set forth under the Express Powers Act. The logic and reasoning of this view cannot be denied if the usual and proper constructions of constitutional law are followed. The fact that the three criminal penalties of Chapter 50 of the Montgomery County Code, 1950 (ed.), do exceed the aforementioned prohibitions leaves the inescapable conclusion that the act is unconstitutional and therefore void. See *Gordon* v. *Commissioners of Montgomery County*, 164 Md. 710.

Now let us assume for the purpose of argument that Chapter 50 is valid. This assumption raises the difficult problem of the search warrant issued in these cases by

Judge Woodward. The immediate query is whether or not a circuit court judge has the authority under this special local law to issue a search warrant. The fact that a circuit court judge did issue this search warrant is undenied, but the ultimate authority to do such an act is lacking. Chapter 50 specifically provides who may issue a search warrant (App. 32) and to whom the return shall be made. Nowhere in the sections of Chapter 50 is this authority given to a circuit court judge. It was obviously withheld from said judges because Chapter 50 is a "Local Law". If a circuit court judge was given authority to issue this search warrant then Chapter 50 could not be purely "local law", because the circuit court judges in Montgomery County sit in Frederick County, as the 6th judicial circuit covers both counties. In order to be a "local law" the authority to issue search warrants must be reposed in persons who have authority to act only in Montgomery County, and a glance at Chapter 50 shows that the legislature had this in mind when it expressly withheld this authority from the circuit court judges in order to meet the constitutional requirements of a "local law". Having been issued in violation of the very law under which it was purported to be issued, can it possess any validity? The question answers itself. This problem was raised in *Hart* v. *State*, 103 S. 633, which is a Florida case involving a search warrant issued by a municipal court judge, whereas the statute under which it was issued contained no provisions for a municipal court judge to issue such a warrant. In reversing the lower court the Supreme Court of Florida said " * * * no municipal court judges were named as persons who could issue a search warrant and no one except those enumerated in the statute had power to issue search warrants and any attempt to do so is a high-handed invasion of the sanctity of the home * * *." See also 56 C. J. 1160 through 1209. This Court has many times reviewed the issuance of search warrants

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and has established the unalterable principle that if the search warrant is bad, the prosecution fails and evidence seized thereunder is inadmissible and the entire prosecution is void ab initio, and further that evidence so seized cannot be made to correct or legalize the original error and illegality. The history of the common law shows that originally search warrants were unknown; later they came into existence only under guarded circumstances. The courts clearly saw that these warrants were an invasion of the private rights of man and in absolute derogation of his personal liberties and dignities. Our courts today and this Court recognize this invasion and refuse to permit it except in rare circumstances and then only if the state follows explicitly the requirements set forth by statute. Surely the right to enter a man's castle, is so delicate that its exercise must be guarded jealously by our courts. The legislature in this case has set forth just how this delicate right is to be exercised. It is the duty of our courts to keep an unceasing vigilance and alert eye on the acts of those entrusted with this destructive power, and when an example of a flagrant abuse of this right is brought before this Court the action by this Court in correcting the errors below and stamping out the abuses must be swift, certain and final. The sanctity of the home must not be cast aside like a second-hand toy. The rights of men were won with blood and toil through long hard years of struggle. We cannot now by judicial fiat cast them down the path that leads to tyranny and despotism. We in this great land have given too much, in sacrifice and lives, to gain the wonderful freedoms we now enjoy, to have them ripped asunder and rendered useless.

The next problem presented by this appeal is that of "probable cause". The query here is whether evidence secured solely through "wire-tapping" is sufficient to constitute probable cause. The appellants assert that no prob-

able cause existed to support the issuance of this search warrant. This is more clearly brought out by the testimony of the police officer Watkins (App. 36) that he never identified the persons using the telephones and in fact the wire-tapping occurred several miles from the home of appellants and the said officer admitted that at the exact moment the wire-tapping occurred he was unable to say who was in the home of the appellants. The officers further testified that they never watched this home, and further that no crime of any kind was committed in their presence by either of the appellants. The application and search warrant fail to state any grounds for probable cause except the wire-tapping. The appellants doubt strenuously that such vague, illegal and illusory evidence can, in this or any jurisdiction, constitute probable cause, sufficient to justify the issuance of a search warrant. Surely today in the light of recent decisions of this Court and the Supreme Court of the United States, the courts must require more, in the way of real and positive, evidence to permit police officers to enter a man's castle and make a search therein, than the mere vocal assertion by a police officer that he tapped a person's phone and as a result believes a misdemeanor is being committed. Especially when the officer takes the witness stand and says he did not recognize the voices overheard, could not identify any of them, did not know who was in the home at the time of the illegal wire-tapping, and further that no unusual activity occurred at the address of the appellants and that no crime was committed in his presence. In the face of this kind of testimony by a witness for the state, appellants contend that to permit this type of illusory evidence to be sufficient to constitute probable cause will open the door to every conceivable kind of mischief and wrong doing by over-zealous police officers. Appellants believe in all sincerity and humility that there is no recourse open to this Court but to hold that

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there has not been sufficient probable cause advanced in this case and hence the search warrant is bad, and all that flowed from it is bad, and can only be corrected by reversing the lower court.

Conclusion

In view of the conflict of decisions noted above and the importance of the question of law as to searches and seizures we respectfully submit that this petition for a writ of certiorari should be granted.

The liberties and properties of all citizens of the United States who resort to the use of a telephone are concerned with a final and determinative ruling by this Court.

In addition, a decision by this Court, will be of inestimable value and assistance to State Judges, prosecutors and police, when the desire or advisability of utilization of wire-tapping evidence is made to appear.

Where millions are concerned with knowing the true rule to follow—and the figure is not exaggerated—it is desirable that this Court enunciate and lay down that rule for the guidance and benefit of all.

Respectfully submitted,

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